No. 17-55435

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, ET AL.,

Plaintiffs-Appellants,

v.

NESTLE, S.A., ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Central District of California
in Case No. 05-05133 SVW-MRW (Wilson, J.)

DEFENDANT-APPELLEE CARGILL, INCORPORATED'S SUPPLEMENTAL BRIEF REGARDING *JESNER V. ARAB BANK, PLC*

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly traded company owns 10% or more of its common stock.

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INTRODUCTION

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018), confirms that this action under the Alien Tort Statute ("ATS") should be dismissed.

The Court's holding—that "foreign corporations may not be defendants in suits brought under the ATS" (138 S. Ct. at 1407)—does not apply to Cargill, Incorporated, which is a U.S. company. But the Court's analysis provides important guidance for the legal issues presented here—and powerful additional support for the district court's judgment dismissing Plaintiffs' ATS claims.

The Supreme Court majority repeated, and expanded upon, its prior admonition that courts must exercise extreme caution before recognizing new liability under the ATS. It also emphasized that Congress's purpose in enacting the ATS was to reduce—not exacerbate—diplomatic tensions, and courts therefore should not permit claims to go forward unless they would have that effect. *Id.* at 1406-07.

First, *Jesner* confirms that Plaintiffs seek an impermissible extraterritorial application of the ATS. The Supreme Court's emphasis on avoiding foreign tensions provides strong additional support for the holding below that the generally-applicable "focus" test for identifying

impermissible extraterritorial applications of U.S. laws, set forth in *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247 (2010), applies to the ATS. Here, all of the alleged international-law violations occurred in Côte d'Ivoire. To allow this case to proceed would intrude into the affairs of a foreign nation—in direct contravention of *Jesner*.

Second, *Jesner* also requires rejection of Plaintiffs' attempt to assert an aiding-and-abetting claim. As the allegations here demonstrate, aiding-and-abetting liability massively expands the reach of the ATS, allowing plaintiffs to bring suits-by-proxy against foreign actors merely by alleging "aid"—in whatever small way—of torts committed on foreign soil. At a minimum, *Jesner* reaffirms that any such liability standard must meet *Sosa*'s requirement of an international-law norm that is specific, universal, and obligatory; Plaintiffs' claim fails that test. More fundamentally, aiding-and-abetting liability cannot survive step two of *Sosa*, as elucidated by *Jesner*, which requires courts to weigh potential consequences to foreign relations before recognizing new liability under the ATS.

Third, *Jesner* requires rejection of Plaintiffs' attempt to combine (1) an extraterritoriality test that brings into U.S. courts claims relating

principally to events occurring in the territory of other nations, with (2) an extraordinarily expansive legal standard for aiding-and-abetting liability that effectively puts on trial in U.S. courts the conduct of foreign principals, including government officials and foreign corporations. Joining these two broad liability standards creates a form of liability plainly prohibited by *Jesner*.

Finally, if the Court were to conclude that Plaintiffs' claim is otherwise permissible, *Jesner* requires reconsideration of Ninth Circuit precedent recognizing corporate liability under the ATS. *Jesner* left that question open, but its analysis of the international-law authorities, its reliance on the congressionally-enacted standards of liability in the Torture Victim Protection Act, and its statements regarding reluctance to expand the scope of liability leave no doubt that domestic corporations cannot be held liable under the ATS.

ARGUMENT

JESNER CONFIRMS THAT PLAINTIFFS CANNOT MAINTAIN THEIR CLAIM UNDER THE ATS.

A. *Jesner* Requires Courts To Exercise Extreme Caution Before Recognizing ATS Liability.

The Supreme Court's *Jesner* decision consists of an opinion written by Justice Kennedy in part for the majority and in part for a

three-Justice plurality; separate opinions by Justices Alito and Gorsuch concurring in part in Justice Kennedy's opinion and concurring in the judgment; and a dissenting opinion for four Justices written by Justice Sotomayor. The governing principles are established by the opinions written by Justices Kennedy, Alito, and Gorsuch.

The five-Justice majority reiterated that courts must exercise "great caution" before recognizing a basis for liability under the ATS not previously endorsed by the Supreme Court, and held that courts may do so—if at all—only under very limited circumstances. 138 S. Ct. at 1403 (quoting *Sosa v. Alvarez–Machain*, 542 U.S. 692, 728 (2004)).

The first part of Justice Kennedy's opinion, which a majority of the Court joined, explains why courts should be particularly reluctant to expand ATS liability beyond the bounds expressly authorized in prior Supreme Court decisions.

The Court began by explaining that "*Sosa* is consistent with [the] Court's general reluctance to extend judicially created private rights of action," which rests on "doubt" about "the authority of courts to extend or create private causes of action even in the realm of domestic law, where th[e] Court has 'recently and repeatedly said'" that such issues

are "'better left to legislative judgment in the great majority of cases.'" *Id.* at 1402 (quoting *Sosa*, 542 U.S. at 727).

Indeed, the Court made clear that the rule against extending judicially-created causes of action applies with special force to the ATS:

> Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. ***That the ATS implicates foreign relations "is itself a reason for a high bar to new private causes of action for violating international law***."

Id. at 1403 (emphasis added) (quoting *Sosa*, 542 U.S. at 727).

Pointing to *Sosa*'s statement that courts should exercise "great caution" in recognizing new liability under the ATS, the Court stated that "[i]n light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Ibid.*

The second part of Justice Kennedy's opinion commanding a majority stated that "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for

international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring." *Id.* at 1406. The Court concluded that extending liability to foreign corporations was precluded by "judicial caution under *Sosa* [that] 'guards against our courts triggering * * * serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" *Id.* at 1407 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)).

The plurality sections of Justice Kennedy's opinion, joined by two other Justices, focused on the two-part inquiry specified in *Sosa*, and made clear the very demanding standards an ATS claim must satisfy. With respect to whether there is a norm of corporate liability established under international law, the plurality determined that "the international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*." *Id.* at 1402. The plurality canvassed a number of factors in addressing *Sosa*'s second inquiry, concluding that the decision whether to impose liability on foreign corporations should be left to Congress.

In their separate opinions, Justices Alito and Gorsuch took an even narrower view of courts' ability to expand ATS liability. Justice Alito stated that the result in *Jesner* was compelled "not only by 'judicial caution' but also by the separation of powers." *Id.* at 1408 (concurring opinion). Emphasizing the overarching purpose of the ATS—to "avoid diplomatic friction"—he concluded that unless liability "would actively decrease diplomatic disputes," the courts "have no authority to act" and must leave the matter to Congress. *Id.* at 1410-11.

Justice Gorsuch stated that the Court should "end ATS exceptionalism" and treat requests to recognize new causes of action under the ATS the same as any other request to invent a new federal common law cause of action. *Id.* at 1412 (concurring opinion). Justice Gorsuch also found "[a]nother independent problem" in *Jesner*—that no ATS action should be permitted where the claim is asserted only against foreign defendants. *Id.* at 1414.

Taken together, the majority and concurring opinions in *Jesner* emphatically hold that courts should be extremely reluctant to expand ATS liability beyond the reach of the Supreme Court's opinions, and especially reluctant to permit liability not authorized by Congress.

B. *Jesner* Supports The District Court's Holding That Plaintiffs' Claim Rests On An Impermissibly Extraterritorial Application Of The ATS.

Plaintiffs' chief attack on the district court's extraterritoriality holding is that it applied *Morrison*'s "focus" test rather than a less stringent "touch and concern" standard. *E.g.*, Opening Br. 16. *Jesner* confirms that the court below correctly rejected this argument.

First, the *Jesner* majority emphasized the need for great caution in recognizing causes of action. *See* pages 4-5, *supra*. Yet Plaintiffs advocate a legal rule that deems an application of the ATS "not extraterritorial," and thus permissible, where the test applicable to congressionally-enacted causes of action would bar suit. Allowing application of the ATS based on a weaker connection to U.S. conduct than for laws adopted by Congress is precisely the opposite of what *Jesner* directs. If anything, "the foreign-policy and separation-of-powers concerns inherent in ATS litigation" (138 S. Ct. at 1403) require a *stricter*—not more lenient—test for extraterritoriality.

Second, *Jesner* held that "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the

absence of such a remedy might provoke foreign nations to hold the United States accountable." *Id.* at 1406; *see also id.* at 1398.

Permitting a claim to proceed where the alleged international-law violation occurred in the sovereign territory of a foreign nation, and was allegedly committed by that nation's citizens, bears no relation to Congress's purpose. But that is what Plaintiffs advocate here.

They seek redress for alleged torts and resulting injuries, all of which took place in Côte d'Ivoire at the hands of foreign nationals. *See* Cargill Br. 16-24. The alleged aiding-and-abetting actions—giving Ivoirian farmers money, farming supplies, and training—likewise occurred in Côte d'Ivoire. *Id.* at 23. There is no basis to conclude that Côte d'Ivoire would be antagonized by the absence of a new remedy in U.S. courts for a claim asserting these facts.

Third, the *Jesner* majority emphasized the importance of refusing to recognize ATS liability that would increase, rather than decrease, international tensions. 138 S. Ct. at 1406; *see also id.* at 1407 ("[T]he presumption against extraterritoriality * * * 'guards against our courts triggering * * * serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'"). That is

precisely what Plaintiffs' loose extraterritoriality test would do—expand the ATS to encompass claims with only a minimal tie to the U.S. and intrude unjustifiably on the sovereign authority of other nations.

Fourth, because *Jesner* declined to address the extraterritoriality issue in that case (*see* 138 S. Ct. at 1406), the Supreme Court's decision in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) ("*RJR*"), establishes the governing rule. Certainly *Jesner*'s quotation of *Kiobel*'s "touch and concern" language in describing the history of ATS decisions by the Court (138 S. Ct. at 1406)—and not in support of any legal analysis—provides no authority displacing *RJR*.

C. *Jesner* Bars Plaintiffs' Aiding-And-Abetting Claim.

The Supreme Court has never upheld aiding-and-abetting liability under the ATS. *Jesner*'s directive that courts be extremely reluctant to recognize new forms of liability thus applies with full force.

That requires, at a minimum, that this Court apply rigorously the two-part test set forth in *Sosa*. Cargill explained in its answering brief (at 37-45) that—with respect to step one of *Sosa*—the only aiding-and-abetting standard supported by the necessary specific, universal, and obligatory international-law consensus requires proof that the alleged

aider and abettor's acts were specifically directed to the perpetration of the offense. And Plaintiffs' allegations of ordinary commercial activities do not come close to satisfying that standard. *Id.* at 45-54.

Moreover, permitting an ATS claim to go forward based on these allegations would violate *Sosa*'s second step. The *Jesner* plurality warned that "allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations," which could prevent the "economic development that is so often an essential foundation for human rights." 138 S. Ct. at 1406. Precisely the same consequences would result from permitting aiding-and-abetting claims on the allegations here. Cargill Br. 45-54.

Finally, allowing a claim with these allegations to go forward would frustrate the ATS's "principal objective" of "avoid[ing] foreign entanglements" and "promot[ing] harmony in international relations." *Jesner*, 138 S. Ct. at 1397, 1406. The relevant events all occurred outside the U.S. (Cargill Br. 17-18); the primary conduct alleged was engaged in by foreign principals, including allegedly by foreign

government officials (*id.*; ER 147, 158-162); and the Second Amended Complaint alleges that Plaintiff's injuries resulted from "the acts and/or omissions of responsible state officials and/or their agents." ER 164. Indeed, the express goal of this litigation is to change practices occurring on the ground in Côte d'Ivoire. ER 132, 168 (requesting injunctive relief). It is difficult to imagine a clearer example of a proposed use of the ATS to interfere directly with another nation's prerogatives. *See Jesner*, 138 S. Ct. at 1404 (plurality) (citing aiding-and-abetting claims as an example of plaintiffs' use of "corporations as surrogate defendants to challenge the conduct of foreign governments").

That is particularly true when, as here, the corporations alleged to have aided and abetted violations of international law are actually working to improve conditions. Cargill's answering brief explains (at 25-26) that Plaintiffs' allegations demonstrate that Cargill is *against* child slavery, is working to "raise awareness of child labor issues," and holds cocoa producers to an *anti*-slavery standard. ER 151-155.

If the Court concludes that Plaintiffs' allegations are sufficient to state a claim under the proper aiding-and-abetting standard, it would have to address whether *Jesner* precludes aiding-and-abetting liability.

Although this Court previously permitted aiding-and-abetting claims under the ATS to proceed (*Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014)), that determination would have to be reconsidered under the standard established in *Jesner*.

Both factors cited by the *Jesner* majority—the reluctance to expand judicially-created causes of action and the risk of international friction—weigh heavily against permitting such liability. *Cf. Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 182 (1994) (refusing to recognize aiding-and-abetting liability under the judicially-created securities fraud cause of action). And the "analogous statute[]" cited by the *Jesner* plurality (138 S. Ct. at 1398, 1403)—the Torture Victim Protection Act ("TVPA")—does not create aiding-and-abetting liability. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1128 (9th Cir. 2010).

D. Plaintiffs' Attempt To Combine Broad Extraterritorial Reach And Expansive Aiding-And-Abetting Liability Contravenes *Jesner*.

Even if the Court were to conclude, contrary to our submission, that Plaintiffs' proposed standards for extraterritoriality and aiding-and-abetting liability could—assessed independently—satisfy the

standards that the Supreme Court set forth in *Sosa*, *Kiobel*, and *Jesner*, the combination of those standards plainly makes ATS liability impermissible under *Jesner*.

The resulting cause of action would permit substantial intrusions into the sovereignty of other nations by upholding claims with only a tangential link to the U.S. that provide a means to challenge the actions of foreign nationals and sovereigns—as Plaintiffs' claim does here for the reasons discussed above.

E. This Court Should Reconsider Its Precedent Recognizing Corporate Liability Under The ATS.

If the Court concludes that Plaintiffs' claim may proceed notwithstanding the arguments set forth above, it would be obliged to reconsider the Ninth Circuit precedent subjecting domestic corporations to liability under the ATS. In its prior decision in this case, the Court held that the analysis of whether corporate liability exists under the ATS "does not depend on the existence of international precedent enforcing legal norms against corporations." 766 F.3d at 1022.

Jesner left unresolved the question whether domestic corporations are subject to ATS liability, but the Supreme Court majority's analysis places great weight on the principles that judge-created liability should

not be expanded and that any expanded liability must justified by the need to promote harmonious relations with other nations—factors that this Court did not address in *Doe I* and that weigh heavily against liability. Similarly, this Court did not address the factors relevant under the *Sosa* standard, which were closely analyzed by the *Jesner* plurality.

Thus, the *Jesner* plurality recognized with respect to *Sosa*'s first step that "[t]he international community's conscious decision to limit the authority of [international criminal tribunals] to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." 138 S. Ct. at 1401. And the *Jesner* plurality stated, in analyzing *Sosa*'s second step, that Congress' decision to exclude liability for corporations in TVPA actions—instead limiting liability to natural persons—is "all but dispositive" with regard to corporate liability under the ATS. *Id.* at 1404.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Cargill's answering brief, the order below should be affirmed.

Dated: May 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32-1, and the Court's April 25, 2018 Order because it is 15 pages or fewer, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 18, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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